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No. 89-756

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BROTHERHOOD OF RAILROAD SIGNALMEN
AFL-CIO, et al.,
Petitioners

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Courts below correctly concluded that the collective bargaining agreements between SEPTA and its commuter rail unions, each of which contains no-strike clauses, arguably preclude a sympathy strike and, accordingly, properly enjoined such a strike pending compulsory arbitration of the scope of the no-strike provisions under the Railway Labor Act's minor dispute resolution procedures?

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Respondent, Southeastern Pennsylvania Transportation Authority ("SEPTA") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the Brotherhood of Railroad Signalmen, *et al.* (the "Unions"). The Unions seek review of the Third Circuit's opinion affirming the District Court's preliminary injunction against a sympathy strike by the Unions. That opinion is reported at 882 F.2d 778 (3d Cir. 1989) and is reproduced in the Appendix to the Petition ("Pet. A".) 1a-26a.

STATEMENT OF THE CASE

SEPTA operates an urban mass transportation system serving the counties of Philadelphia, Bucks, Montgomery, Chester and Delaware in the Commonwealth of Pennsylvania as well as Mercer County in the State of New Jersey and New Castle County in the State of Delaware. The system consists of the City Transit Division which operates subways, buses and trolleys within the City of Philadelphia; the Red Arrow Division, which operates buses and inter-urban trolleys in Delaware and Montgomery counties, Pennsylvania; the Frontier Division, which operates bus routes predominantly in Montgomery and Bucks counties; and, the Regional Rail Division, which operates the commuter railroads in the seven county area.[1] The Regional Rail Division makes in excess of 90,000 passenger trips per day in the tri-state area. Pet. A. 4a.

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1. SEPTA operates the commuter railroads pursuant to the Congressional mandate contained in the Rail Passenger Service Act, 45 U.S.C. §581-591, the Regional Rail Reorganization Act, 45 U.S.C. §702 and 744(a) and the Northeast Rail Service Act, 45 U.S.C. §1101-1104, which governed the transfer of Conrail's commuter rail operations in the Northeast Corridor to various "commuter authorities", including SEPTA.

The Unions consist of various labor organizations which represent employees of the Regional Rail Division, including a small bargaining unit composed of approximately 30 machinists represented by a local union of Petitioner International Association of Machinists ("IAM"). Joint Appendix Before The United States Court of Appeals for the Third Circuit ("J.A.") 115. This case arose when the IAM, on behalf of its striking members employed by Eastern Airlines ("Eastern"), threatened to erect picket lines at SEPTA commencing on Monday morning, March 6, 1989. The Unions expressly stated their intention to honor such picket lines. Pet. A. 4a-5a; J.A. 173-181.

SEPTA took over Conrail's commuter operations in the Philadelphia region on July 1, 1983. It then negotiated collective bargaining agreements with the Unions. Each of the agreements negotiated in 1983, and since renewed, contains an arbitration provision and no-strike provisions. The no-strike provision in the body of each of the agreements, except that with the International Brotherhood of Electrical Workers ("IBEW"), provides that:

> With respect to a strike by this Union, the provisions of the Railway Labor Act shall apply.

Each such contract also contains a side letter of agreement containing "additional understandings" regarding the no-strike obligation. The texts of the side letters vary, but all specifically preclude sympathy strikes in support of picketing by "SEPTA non-commuter rail employees."[2] None restrict the ban to that situation. To the contrary, the side letters of the Brotherhood of Railroad Signalmen ("BRS"), United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers ("BLE"), define the specific circum-

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2. The IBEW agreement contains an express ban on sympathy strikes in its main body without reference to any side letter. Pet. A. 5a n. 2.

stances under which those unions *would* conduct a sympathy strike. For example, that of the BRS states that the no-strike clause and side letter are subject to the policy of that union "to support its members in declining to work when another *railroad labor organization* is on strike." (emphasis added). The BLE and UTU agreements predicate the honoring of picket lines on a finding of fear of physical danger by their respective members. Pet. A. 5a-7a.

SEPTA understood that these no-strike provisions and side letters precluded any sympathy strike by the Unions on the Regional Rail Division, except in the event of a primary strike by one of the Unions against the Regional Rail Division itself. Pet. A. 15a-17a.[3] At the preliminary injunction hearing, Transportation Communications Union ("TCU") International Vice-President Robert Scardeletti ("Scardeletti"), who participated actively in the 1983 bargaining, substantially corroborated that understanding. Scardeletti recalled that when he explained the no-strike clause during the 1983 membership ratification process, he told his membership that if a "rail union" put up a picket line, they could honor it. J.A. 227-228. Scardeletti does not consider the Eastern Airlines machinists, whose threat to picket SEPTA precipitated this proceeding, to be a "rail union" and, to the contrary, testified that:

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3. The Unions claim that notwithstanding their agreement to no-strike clauses, they intended to preserve whatever rights they had to conduct secondary picketing or to honor secondary picket lines as those rights existed in 1983. J.A. 216-217. As of 1983, the Unions' right to conduct or to honor secondary picketing was significantly limited by the then prevailing "substantial alignment" doctrine. *Ashley, Drew and Northern Railways v. United Transportation Union*, 625 F.2d 1357, 1364-1365 (8th Cir. 1980); *Lakefront Dock and Railroad Terminal Company v. International Longshoremen's Association*, 333 F.2d 549, 553 (6th Cir. 1962); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Company*, 362 F.2d 649 (5th Cir.), *aff'd*, 385 U.S. 20 (1966).

> I would have to say that's an airline union. I mean, that's the only thing I would call it. I couldn't call it a rail union if it's not on the rail.

J.A. 228.

Following the IAM's threat to conduct secondary picketing of SEPTA in connection with the Eastern strike, there occurred a series of telephone conversations between SEPTA's Acting Chief Industrial Relations Officer Robert Birnbrauer and officials of the Unions. In those conversations, the Unions stated that their respective members would honor any picket line set up by the Eastern machinists at SEPTA's facilities. Accordingly, on Friday, March 3, 1989, Birnbrauer sent a mailgram to each of the Unions confirming that SEPTA considered the various collective bargaining agreements to require the members of the Unions employed by SEPTA to cross any such picket lines and report to work as usual. J.A. 94-95. On that evening, the District Court imposed a temporary restraining order against the threatened sympathy strikes. On Tuesday, March 7, 1989, SEPTA formally submitted the disputes over the interpretation of the various no-strike clauses and side letters to arbitration. J.A. 84-93; Pet. A. 32a.

On March 7 and 8, 1989, an evidentiary hearing was held before the District Court. Following the submission of proposed findings of fact and conclusion of law, on Wednesday afternoon, March 8, 1989, the Court issued a memorandum and preliminary injunction order continuing the temporary restraining order. Neither the temporary restraining order nor the preliminary injunction contains any restraint whatsoever on picketing by the Eastern machinists represented by the IAM. Rather, the injunction applies solely to the actions of the commuter rail employees employed by SEPTA. Pet. A. 4a.-5a.[4] Moreover, the injunction only prohibits the

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4. The Unions have continuously mischaracterized the nature of the injunction as being against conduct by the Eastern Airlines

Unions "from striking pending resolution of the minor dispute", Pet. A. 19a, over the scope of the no-strike obligation by arbitration.

REASONS FOR DENYING THE PETITION

Despite the Unions' attempt to rephrase the issues, expand the Questions Presented,[5] and fashion a conflict,

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NOTES *(Continued)*

machinists who are lawfully striking that airline. For example, in their Emergency Application for Stay and for Vacation of Injunction to Justice Brennan filed March 10, 1989, the Unions, at page 3, protested that:

> "The District Court has thrown in its lot with Eastern."
>
> and
>
> "The federal judiciary has provided another victory for Eastern."

See also the Petition for Certiorari herein ("Pet.") at pages 8-10 and the Petitioner's parallel Petition for Certiorari to the United States Court of Appeals for the Second Circuit (parts of which are incorporated by reference in the present Petition) at pages 6-7.

The Unions argue that "the decision below . . . is in everything but name an across-the-board proscription on sympathy strikes in the railroad and airline industries . . . Pet. 8; "the court of appeals gave *no weight whatsoever* to the rights of the Eastern employees." Pet. 9; and, "[the decision below] negate[s] the basic statutory right to strike and to picket for a new collective bargaining agreement merely upon finding that the position of one party is 'arguable' ". Pet. 10. Thus, the Unions continue to ignore the fact that the Eastern machinists are not and never have been a party to this litigation nor are they subject to the preliminary injunction.

5. The Unions have posed identical Questions Presented in the petition filed in this case and that filed in *International Association of Machinists and Aerospace Workers, AFL-CIO v. The Long Island Railroad Company*, No. 89-427 ("Second Circuit Pet."). *See* Pet. (i). The Unions have also incorporated pages 4-16 of the Second Circuit Petition by reference. *See* Pet. 7. (The Unions served SEPTA with the Second Circuit Petition, Pet. 7 n.9, but failed to serve SEPTA with their Reply Brief in No. 89-427 filed on November 20, 1989. Therefore, the Reply Brief is not treated as incorporated in this Petition). SEPTA, therefore, incorporates by reference the Briefs in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Respondents, Long

the issue before the Supreme Court is that presented to the Third Circuit and articulated by that court as follows:

> The threshold question is whether the dispute between SEPTA and the unions can be termed a "minor dispute" as that phrase is used in the context of the RLA. 45 U.S.C. §151 *et seq.* If we find that a minor dispute exists, we must then determine whether the preliminary injunction prohibiting the unions from going on strike was properly issued.

Pet. A. 8a. Relying on the decision in *Consolidated Rail v. Railway Labor Executives' Association,* 109 S.Ct. 2477 (1989), the Third Circuit further defined the "discrete question" to be:

> . . . whether SEPTA met its light burden of showing that the no-strike provisions in the respective collective bargaining agreements, taken in conjunction with the side letter agreements, policy statements and any other evidence of the intent of the parties which may properly be considered, *arguably prohibit the unions from engaging in a sympathy strike with the Eastern employees at this point.*

Pet. A. 10a (emphasis added). The Unions represent the issue as being one which:

NOTES *(Continued)*

Island Railroad Company and Metro-North Commuter Railroad-Company on October 23, 1989 and Respondent, National Railroad Passenger Corporation ("Amtrak") on November 15, 1989.

By incorporating pages 4-16 of the Second Circuit Petition by reference, the Unions present their argument for certiorari in the context of the Second Circuit decision and not that of the Third Circuit. Although the Second Circuit decision is wholly consistent with that of the Third Circuit, it was decided before this Court's decisions in *Consolidated Rail v. Railway Labor Executives' Assn.,* 109 S.Ct. 2477 (1989) and *Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives Assn.,* 109 S. Ct. 2584 (1989). Therefore, the Second Circuit could not rely on those decisions as did the Third Circuit.

> . . . raises an absolutely fundamental question of federal labor policy: whether the federal courts' equity powers should be directed against concerted refusals to work that do not arise out of the employees' dispute with their immediate employer but out of a refusal to cross a picket line set up by another group of organized employees in the latter's effort to obtain a new collective bargaining agreement.

Pet. 6. The Unions thereby seek to strengthen the economic and political position of the Eastern machinists at the expense of the Unions' express contractual commitments to SEPTA to arbitrate disputes, to eschew sympathy strikes and not to strike in violation of the Railway Labor Act, 29 U.S.C. §151 *et seq.* ("RLA").

I. THE DECISION OF THE THIRD CIRCUIT IS CONSISTENT WITH THE HOLDINGS OF THIS COURT AND WITH CONGRESSIONAL POLICY UNDERLYING THE RAILWAY LABOR ACT.

The Supreme Court decisions against which the Third Circuit's decision in this case must be measured are those in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30 (1957), *Consolidated Rail Corp. v. Railway Labor Executives' Assn.*, 109 S.Ct. 2477 (1989) and *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Assn.*, 109 S.Ct. 2584 (1989). The Third Circuit's decision in this case is completely consistent with those decisions and with the purposes of the RLA. It correctly placed diminished emphasis on law developed under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*[6] ("NLRA").

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6. The Second Circuit heard oral argument in *Long Island Railroad v. International Association of Machinists*, 874 F.2d 901 (2d Cir. 1989) on March 28, 1989 and rendered its opinion on April 10, 1989. The Third Circuit heard oral argument on April 18, 1989 but did not render its opinion until August 14, 1989. This Court

A. Unlike The National Labor Relations Act, In The RLA, Congress Provided For Compulsory Arbitration Of Grievances And Thereby Imposed A Statutory No-Strike Clause.

There are basic differences in the nature of the two statutes. In *Chicago River,* this Court reviewed the legislative history of the 1934 amendment to the RLA, which inserted § 153, First, creating the National Railroad Adjustment Board and imposing "compulsory arbitration" of minor disputes "over the meaning of an existing collective bargaining agreement in a particular fact situation." 353 U.S. at 33. The impetus for the 1934 amendment arose from the many strikes that had occurred in minor dispute situations after the enactment of the RLA in 1926. 353 U.S. at 35-36.

The Court, noting that not all unions concurred in the 1934 legislation, quoted a representative of the Teamsters, who testified before the Senate that:

> We are unalterably opposed to paragraph M, . . . [which] brings about compulsory arbitration and prevents the use of the only weapon in the hands of organized labor. . . .

353 U.S. at 39. Notwithstanding that "[t]he voice of labor was not unanimous", the Court noted that:

> This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited

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NOTES *(Continued)*

handed down *Consolidated Rail* and *Pittsburgh & Lake Erie,* two RLA cases, on June 19, 1989 and June 21, 1989, respectively, three months and five months prior to the filing of the IAM petition and the Petition in this case. The Unions virtually ignore those decisions notwithstanding that the Third Circuit relied upon both in reaching its decision.

> field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history.

353 U.S. at 39. Thus, the *Chicago River* decision underscores the clear legislative intent to incorporate in the RLA itself a ban on strikes concerning minor disputes. Consequently, this Court in *Pittsburgh & Lake Erie,* declared:

> . . . a union may be enjoined from striking when the dispute concerns the interpretation or application of its contract and is therefore subject to compulsory arbitration.

109 S.Ct. at 2598.

The NLRA, unlike the RLA, does not contain a statutory no-strike policy nor does it require compulsory arbitration of grievances (minor disputes).

B. Under *Consolidated Rail,* A Minor Dispute Exists Where A Claim, In This Case That Sympathy Strikes Are Foreclosed, Can Arguably Be Justified By The Collective Bargaining Agreement.

As of March 3, 1989, there was a pending dispute over the scope of the no-strike clauses, which SEPTA submitted to arbitration on March 7, 1989. In determining whether that dispute constitutes a "minor dispute", the Third Circuit followed the definition articulated in *Consolidated Rail*. The Third Circuit looked for "the distinguishing feature of a minor dispute", that is, that the 'dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement.' " Pet. A. 9a quoting *Consolidated Rail*, 109 S.Ct. at 2480. The Third Circuit further noted that in *Consolidated Rail*, this Court stated:

> 'If the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action

> is not 'obviously insubstantial', the controversy is a minor dispute within the exclusive province of the National Railroad Adjustment Board.'

Pet. A. 10a quoting *Consolidated Rail,* 109 S.Ct. at 2482.[7] In applying the arguably justified standard to reach the conclusion that the dispute between SEPTA and the Unions was minor, the Third Circuit determined that "[b]ased on all of the evidence", Pet. A. 18a, SEPTA met its "light" burden. Pet. A. 10a quoting *Consolidated Rail,* 109 S.Ct. at 2488. The Third Circuit held that SEPTA's position that the no-strike clauses and side letters forbid the honoring of the threatened Eastern machinists' picket line was "not so frivolous or insubstantial as to lack arguable justification". Pet. A. 18a.

In determining that there existed a minor dispute, the Third Circuit held that the district court did not have to find that the "unions' collective bargaining agreements 'clearly and unmistakably' evidenced that the unions waived their rights to engage in a sympathy strike with the Eastern employees", Pet. A. 10a, to grant SEPTA injunctive relief. Pet. A. 11a. The Third Circuit found that "borrowing the 'clear and unmistakable' standard from NLRA precedent is wholly inappropriate in the circumstance of the . . . case". *Id.* To hold otherwise, would be "fundamentally at odds with the [arguably justified] standard set forth by the Supreme Court [in *Consolidated Rail*]." Pet. A. 12a.

Relying again upon *Consolidated Rail,* the Third Circuit rejected the Unions' contention that the District Court erred in contemplating that parol evidence of the

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7. In *Consolidated Rail,* this Court, actually quoted and adopted the standard set forth by the Third Circuit in the *Consolidated Rail* opinion below. This Court noted that "the Courts of Appeals uniformly have established some variant of the standard employed by the Third Circuit in this case. . ." 109 S.Ct. at 2482. Thus, the Third Circuit in this case was applying a standard with which it was familiar.

bargaining history could be used in interpreting the labor contracts. The Third Circuit noted:

> . . . in *Consolidated Rail* the Supreme Court recently noted that collective bargaining agreements may include implied as well as express terms and that the parties' 'practice, usage and custom is of significance in interpreting their agreement' to determine if one of the parties' position is arguably justified.

Pet. A. 13a quoting *Consolidated Rail,* 109 S.Ct. at 2485.

Accordingly, it is clear that interpretation of the no-strike provisions presents a minor dispute.

C. Under *Chicago River* And *Pittsburgh & Lake Erie,* A Union May Be Enjoined From Striking Pending Compulsory Arbitration Of A Minor Dispute.

In *Chicago River,* this Court concluded that a rail union could not resort to a strike in regard to matters pending in arbitration and that the district court "ha[d] jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." *Chicago River,* 353 U.S. at 42 citing *Brotherhood of R. Trainmen v. Howard,* 343 U.S. at 774.

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these acts are reconcilable.

Chicago River, 353 U.S at 40.

In *Brotherhood of Locomotive Engineers v. Missouri- Kansas-Texas Railroad,* 363 U.S. 528 (1960), this Court further underscored Congressional intent to

incorporate in the RLA itself a ban on strikes concerning minor disputes. There, while relying on *Chicago River,* this Court explained that an injunction of a strike relating to a minor dispute *pending arbitration* did not fall within the prohibition of the Norris-LaGuardia Act. 363 U.S. at 531. This was "because of the superseding purpose of the Railway Labor Act to establish a system of compulsory arbitration for this type of dispute, a purpose which might be frustrated if strikes could not be enjoined during the consideration of such a dispute by the Board." *Id.*

In *Pittsburgh & Lake Erie,* this Court reaffirmed that principle and the Third Circuit relied upon that reaffirmation:

> Only recently, the Supreme Court, citing *Chicago River,* declared that a 'union may be enjoined from striking when the dispute concerns the interpretation or application of its contract and is therefore subject to compulsory arbitration . . .

Pet. A. 19a quoting *Pittsburgh & Lake Erie,* 109 S.Ct. at 2598. From March 3, 1989 on, there was such a dispute. Therefore, the Unions' two arguments against application of that principle were correctly rejected.

First, the Third Circuit found that the Unions' position that "their right to engage in a sympathy strike emanate[d] from the Eastern employees' rights to engage in a secondary strike of SEPTA", Pet. A. 20a, was "analytically flawed". Pet. A. 21a. The Third Circuit did not agree with the Unions that *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, et al.,* 481 U.S. 429 (1987) required that result. The Third Circuit noted:

> It must be remembered that *the rights which this Court is called on to determine are those of the unions* and not those of the Eastern unions. The *rights* of the unions *are determined by their respective collective bargaining agreements and* must be

> *resolved in accordance with the procedures outlined in the RLA. This requires that the unions submit their dispute with SEPTA to binding arbitration. See* 45 U.S.C. §153. Moreover, having found that a minor dispute exists, the courts have the authority under *Chicago River* to maintain the integrity of the arbitration process by enjoining the unions from striking prior to the completion of the arbitration proceedings.

Pet. A. 21a (emphasis added).

Burlington Northern held that "the Railway Labor Act does not bar a union from engaging in secondary activity after the major dispute resolution procedures of the RLA have been exhausted". Pet. A. at 20a. According to the Unions, it would diminish the impact of any secondary activity by the Eastern machinists, if the Unions' members employed by SEPTA cannot honor those picket lines. Pet. A. 20a.[8] The Third Circuit

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8. The Union's position throughout this proceeding has been founded upon the erroneous hypothesis that picketing which is not honored by other employees is useless. To the contrary, as Mr. Justice Douglas pointed out in his concurring opinion in *Bakery & Pastry Drivers and Helpers, Local 802 v. Wohl,* 315 U.S. 769, 776 (1941), picketing is a combination of the "dissemination of information concerning the facts of the labor dispute", and the possibility that "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Similarly, in *Thornhill v. Alabama,* 310 U.S. 88, 101 n. 18 (1939), the Court observed:

> "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: . . . (4) Threaten employees or customers . . .
>
> The picketing may be . . . directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both.

quoting from Hellerstein, "Picketing Legislation and the Courts" (1931), 10 *North Car. L. Rev.* 158, 186n.

There is an entire body of case law under the NLRA setting forth the distinction between "signal" picketing intended to induce

rejected the Unions' attempt to use *Burlington Northern* as "a springboard". Pet. A. 20a. Rather, the Third Circuit held that to embrace the Unions' contention that *Burlington Northern* "suggests that in all cases employees of struck secondary employers must be permitted to honor secondary strikes *notwithstanding* prohibitions against such activity in their own collective bargaining agreements", Pet. A. 21a (emphasis added), would:

> negate provisions in collective bargaining agreements that clearly prohibited employees from engaging in sympathy strikes *and would in cases such as the instant one, where a minor dispute is present, do violence* to the minor dispute resolution mechanism of the RLA and the Supreme Court's decision in *Chicago River*.

Pet. A. 21a (emphasis added). The Third Circuit also noted that in *Consolidated Rail*, "[this] Court flatly recognized that '[c]ourts may enjoin strikes arising out of minor disputes', . . . without noting any possibility of an exception, where such an injunction might dilute another union's right to engage in secondary activity." Pet. A. 22a n.9 citing 109 S.Ct. at 2481.

Although the Third Circuit recognized the general principle that employees may honor picket lines, it held that such recognition "is not inconsistent with requiring

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NOTES *(Continued)*

employees to cease working and "informational" picketing intended to advise the public, as well as employees, of the existence of a dispute and to evoke responses other than a withholding of labor. *See e.g. Miller v. United Food and Commercial Workers Union, Local 498 AFL-CIO*, 708 F.2d 467, 472 (9th Cir. 1983) and §8(b)(7)(C) of the NLRA, 29 U.S.C. §158(b)(7)(C), which permits certain picketing "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment . . . not to perform any services."

Thus, inducing other employees to withhold their labor is only one purpose of picketing and only one of a series of responses which picketing may evoke.

those workers to be bound by other contrary legal obligations that they have undertaken". Pet. A. 22a. In making that analysis, the Third Circuit relied upon this Court's recent decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants,* 109 S.Ct. 1225 (1989), a case decided after *Burlington Northern* and in which this Court pointed out that:

> '[P]arties who have unsuccessfully exhausted the Railway Labor Act procedures for resolution of a major dispute may employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*'

Pet. A. 22a quoting 109 S.Ct. at 1233.

In sum, relying upon *Chicago River, Burlington Northern, Consolidated Rail* and *Trans World Airlines,* the Court below correctly concluded that "the right of the Eastern employees to engage in secondary picketing at SEPTA facilities does not necessarily engender a corresponding right on the part of the unions to honor the picket lines *at this stage.*" Pet. A. 22a-23a (emphasis added).

Second, the Third Circuit rejected the Unions' argument that *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976) applies under the RLA. Buffalo Forge was decided under the National Labor Relations Act which, as discussed above, contains neither the RLA's ban on strikes relating to minor disputes nor its legislated mandate for compulsory arbitration of contract interpretation matters (minor disputes).[9] The

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9. In the 5 to 4 *Buffalo Forge* decision, three Justices, Justices Brennan, Marshall and Powell joined Justice Stevens in dissenting on the ground that a federal court may enjoin a sympathy strike which violates a no-strike clause. This was, of course, in a situation not even involving the transportation industry or the RLA.

It is also specifically noteworthy that Justice Brennan dissented in *Buffalo Forge,* because, as noted in Amtrak's Brief in Opposition

Third Circuit explained that:

> We must approach this problem carefully, keeping in mind the Supreme Court's admonition not to import the NLRA 'wholesale into the railway labor area': . . Thus, 'even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes'.

Pet. A. 24a-25a citing *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 383; and, concluded that:

> Finally, and *perhaps most importantly*, the RLA, unlike the NRLA, was enacted for the purpose of preserving industrial peace by avoiding strikes over minor disputes. (citation omitted). This Court should, therefore, not import principles established in the NLRA context into RLA cases when such action would have the effect of hindering the attainment of underlying remedial goals of the RLA.

Pet. A. 25a (emphasis added).

Other circuit court decisions since *Buffalo Forge*, like the Third Circuit, have rejected its application under the RLA. *See Long Island Railroad v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3297 (U.S. September 13, 1989) (No. 89-427); *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).[10] Thus, not surprisingly, the Unions cite

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NOTES *(Continued)*

at 8 n.7, it was Justice Brennan, as Circuit Justice, who refused to stay the injunction against the sympathy strike by SEPTA's employees in this case, stating it was unlikely that four justices would find the issue worthy of *certiorari*. *See* also Pet. A. 49a. Of further significance is the fact that Justice Brennan wrote the Court's opinion in *Burlington Northern*.

10. In *Trans International Airlines*, then Circuit Judge (now Justice) Kennedy expressly rejected the application of *Buffalo Forge*

no authority in support of their continued contention that the principle embodied in *Buffalo Forge* applies under the Railway Labor Act.[11]

In sum, the Third Circuit correctly relied upon an extensive body of caselaw created by this Court and gave significant weight to the paramount Congressional purpose underlying the RLA to maintain a stable transportation industry by prohibiting strikes regarding minor disputes.

II. THERE IS NO CONFLICT IN THE CIRCUITS

Contrary to the Unions' argument that there are "multiple conflicts in the decisions of the courts of appeals" . . . and a "resulting disarray in the applicable law", Pet. 6, there is no conflict among the circuits on the issue decided in this case. Rather, every circuit court that has addressed the issue has held that a sympathy strike that would arguably violate the collective bargaining agreement between an RLA carrier and its employees may be enjoined pending exhaustion of the Railway Labor Act's dispute resolution procedures. *See Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railroad Signalmen*, 882 F.2d 778 (3d Cir. 1989) (decision below); *Long Island Railroad*, 874 F.2d 901, (decision below in Second Circuit petition);

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under the RLA and sustained the district court's jurisdiction to enjoin sympathy strikes in the airline industry. Judge Kennedy did so primarily because of the strength of Congressional policy to avoid disruption of the transportation business. 650 F.2d at 966-967.

11. Significantly, although the Court in *Buffalo Forge* specifically overruled numerous Court of Appeals decisions affirming injunctions against sympathy strikes under the NLRA, it omitted mention of *Northwest Airlines v. Air Line Pilots Association*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971), in which the Eighth Circuit held that a sympathy strike by employees subject to the RLA was enjoinable. Indeed, the only discussion of Railway Labor Act cases in *Buffalo Forge* appears in the dissent. 428 U.S. at 419-420.

Trans International Airlines v. International Brotherhood of Teamsters, 650 F.2d 949 (9th Cir. 1980), *cert. denied,* 449 U.S. 1110 (1981); *Northwest Airlines v. Air Line Pilots Association,* 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing,* 442 F.2d 251 (8th Cir.), *cert. denied,* 404 U.S. 871 (1971); *Chicago and Illinois Midland Railway Company v. Brotherhood of Railroad Trainmen,* 315 F.2d 771 (7th Cir.), *judgment vacated as moot,* 375 U.S. 18 (1963).

Disregarding the above cited caselaw, the Unions attempt to create the illusion of a conflict by claiming that "[the Second Circuit] petition identifies two basic conflicts among the courts of appeals on important labor law questions". Pet. 6 n.8. The Unions then attempt to clarify their earlier presentation of those "conflicts" as follows:

> The first question is whether the federal courts have authority to enjoin Railway Labor Act sympathy strikes. See Pet. at 8-12. The second is whether, as a more general matter, the federal courts have jurisdiction to enter *status quo* injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement. *See* Pet. 12-13.

Pet. 6 n.8.

In support of the first alleged conflict, the Unions cite *Eastern Air Lines, Inc. v. Air Line Pilots Association,* No. 89-5229 (11th Cir. March 24, 1989) and *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Railway Co.,* 346 F.2d 673 (5th Cir. 1965). Neither decision holds that federal courts do not have authority to enjoin RLA sympathy strikes.

In *Eastern Air Lines,* the Eleventh Circuit vacated the order below denying the airline's application for an injunction prohibiting a strike by its pilots allegedly in support of the machinists' lawful strike. The pilots' union was also seeking a new contract with Eastern and

had *not* exhausted the major dispute resolution process. Although the Eleventh Circuit noted that the RLA "does not unambiguously preclude sympathy strikes", Pet. A. 51a, it did not hold that such a strike was unenjoinable and, instead, remanded to the district court to decide whether the major dispute over a new pilots' contract was the operative reason for the pilots' strike. In any event, unlike the present case, there was no no-strike clause in the pilots' agreement. *See Eastern Air Lines, Inc. v. Air Line Pilots Association,* No. 89-0446 at n.2.[12] (S.D. Fla. April 11, 1989).

Furthermore, as previously noted by the Respondents in their respective Briefs in Opposition to the Second Circuit Petition, the Eleventh Circuit opinion in *Eastern Air Lines* is unpublished. According to that Circuit's Internal Operating Procedure 36-3, which accompanies 11th Cir. R. 36-1, this treatment reflects the panel's belief that the opinion has "no precedential value." *See* Amtrak Brief in Opp. at 2 n.2; Long Island Brief in Opp. at 8. *See also Taylor v. United States,* 110 S.Ct. 265 (1989) (This Court there denied certiorari because the panel's opinion which summarily disposed of petitioner's case and created an apparent conflict was unpublished. Under the applicable Circuit Rule, such opinions "have no precedential value."); G.M. Weaver, *The Precedential Value of Unpublished Judicial Opinions,* 39 Mercer L.Rev. 477, 493 (1988) ("unpublished opinions, because of their lack of promulgation, are not precedents.").

The Unions' reliance on *Florida East Coast Railway Company* is equally misplaced. Unlike the situation in this case, there was no contractual relationship between the railroad seeking the injunction and the Port Authority employees that would have been enjoined. Nor was there a no-strike clause in the contract between the Port

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12. A copy of that opinion was attached to the Unions' Reply Brief of Appellants below.

Authority and its employees. The Fifth Circuit dissolved the injunction which had been issued by the district court because of the "realities of the factual situation...It is the [railroad] that seeks the injunction, not the Port Authority". 346 F.2d at 676. Further, the Fifth Circuit pointed out that since neither the Port Authority nor its employees had submitted the controversy to arbitration (unlike the present proceeding where SEPTA submitted the dispute to arbitration on March 7, 1989), the jurisdiction of the arbitration board was not being defeated and, therefore, an injunction would "in no way serve . . . the policy of the Railway Labor Act. . .". 346 F.2d at 676.

In support of the second alleged conflict, the Unions cite two cases. *Air Line Pilots Association v. Eastern Airlines,* 863 F.2d 891 (D.C. Cir. 1988) and *International Ass'n of Machinists v. Eastern Airlines,* 826 F.2d 1141 (1st Cir. 1988), address the issue whether an employer may be enjoined from changing working conditions pending arbitration. *Neither case involved a strike.* On that fact alone, these cases do not present a conflict with the decision below.

Indeed, in *Air Line Pilots,* where the union sought to enjoin Eastern Airlines from implementing schedule changes and furlough plans, the D.C. Circuit explained that "minor disputes – those 'arising out of the interpretation of collective-bargaining agreements' ", 863 F.2d at 895, – must be submitted to an arbitration board for resolution after negotiation has failed, and, that "[a] union cannot make a minor dispute the subject of a strike". 863 F.2d at 896.

IAM v. Eastern Airlines is equally unavailing to the Unions. There, the court stated that "[i]n disputes governed by the RLA, injunctions may be issued to prevent the violation of specific mandates in the RLA". 826 F.2d at 1146. The First Circuit dissolved the injunction because it had been issued "without reference to any statutory mandate in the RLA." *Id.* The First Circuit

noted that a court may "grant [injunctive] relief only when a union has struck and not otherwise." 826 F.2d at 1149.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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